Supreme Court, U.S.
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981956 JUN 1 - 1999

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No. _____

In The

Supreme Court of the United States

October Term, 1998

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REGINALD RONALD JOHNSON,
Petitioner,

v.

THE STATE OF OKLAHOMA,
Respondent.

- - - - - - - ♦ - - - - - - -

On Petition for Writ of Certiorari
To the Oklahoma Court of Criminal Appeals

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A. Question One:

Reginald Ronald Johnson entered a plea of guilty before the District Court of Oklahoma County, State of Oklahoma, on February 9, 1998, to six felony counts. Before he entered his plea, his attorney told him that if he was unhappy with the sentence that the judge would render, that he could withdraw his plea. Furthermore, his attorney assured him that the trial court would sentence Mr. Johnson to a cumulative sentence of twenty-five years imprisonment. The trial court denied Mr. Johnson's application to withdraw his guilty plea after sentencing him to a total of 160 years on the six felony counts.

The Oklahoma Court of Criminal Appeals held that there was no showing how any omission by counsel in explaining the difference between "withdrawing the guilty plea" and "moving to withdraw the guilty plea" was prejudicial, and thus, there was no ineffective assistance of counsel pursuant to *Strickland v. Washington*, 466 U.S. 686, 696, 104 S.Ct. 2052, 2070, 80 L.Ed.2d 674, 699 (1984).

The question presented here is whether Mr. Johnson was prejudiced within the meaning of his Sixth and Fourteenth Amendment right to effective assistance of counsel when his counsel made a material misrepresentation of the procedure available to Mr. Johnson concerning an application to withdraw his guilty plea, where the sentence ultimately received was much harsher than that represented to him by his attorney?

B. Question Two:

On direct appeal from the denial of the application to withdraw guilty plea, the Oklahoma Court of Criminal Appeals held that Mr. Johnson waived any claim of double jeopardy under the Fifth and Fourteenth Amendments by entering his guilty plea. The Oklahoma Court of Criminal

Appeals cited *Mabry v. Johnson*, 467 U.S. 504, 508, 104 S.Ct. 2543, 81 L.Ed.2d 437 (1984), in support of this holding.

The question presented here is whether the Oklahoma Court of Criminal Appeals erred in holding that a double jeopardy claim under the Fifth and Fourteenth Amendments in a direct appeal from a denial of an application to withdraw a guilty plea is a collateral attack and not a direct attack upon the guilty plea and whether the double jeopardy claim is subject to waiver corresponding to a similar claim under federal habeas corpus review in *Mabry v. Johnson, supra?*

C. Question Three:

At his February 9, 1998, guilty plea hearing, Mr. Johnson appeared with his attorney Michael S. Johnson before the District Court of Oklahoma County. On the summary of facts/plea of guilty form, Mr. Johnson circled the word "no" in response to the question on the form, "You have a right to a record made of these proceedings by a Court Reporter. Do you waive this right? (O.R. 90). The trial judge's court reporter gave an affidavit stating that she had no stenographic notes of the February 9, 1998, guilty plea hearing. (O.R. 90).

On direct appeal Mr. Johnson alleged that his plea of guilty was unknowing and involuntary and that it was error to assume regularity in a guilty plea challenge from a silent record on direct appeal. The Oklahoma Court of Criminal Appeals found that there was no error under *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

The question presented here is whether the Oklahoma Court of Criminal Appeals erred under the Fourteenth Amendment's Due Process Clause in finding that Mr. Johnson's plea of guilty was knowing and voluntary despite Mr. Johnson's refusal to waive a court reporter?

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PETITION FOR WRIT OF CERTIORARI

Reginald Ronald Johnson respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Oklahoma Court of Criminal Appeals entered in this proceeding on March 3, 1999, in order to resolve conflicts on matters of federal constitutional law between that court and this Court on the important issues presented herein.

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OPINIONS BELOW

The Summary Opinion Denying Certiorari of the Oklahoma Court of Criminal Appeals and the Order Denying Rehearing and Directing Issuance of Mandate, both of which give rise to this petition, are unpublished. The Summary Opinion Denying Certiorari is restated verbatim and in its entirety in the Appendix to this petition. The Order Denying Rehearing and Directing Issuance of Mandate is restated verbatim and in its entirety in the appendix to this petition.

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JURISDICTION

On December 29, 1998, the Oklahoma Court of Criminal Appeals issued and filed with the clerk of that court a Summary Opinion Denying Certiorari affirming Mr. Johnson's motion to withdraw guilty plea. On March 3, 1999, the Oklahoma Court of Criminal Appeals issued and filed with the clerk of that court an Order Denying Rehearing and Directing Issuance of Mandate. Pursuant to Supreme Court Rules 13.1 and 13.3, this petition has been filed within ninety (90) days from the denial of rehearing.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

The Fifth Amendment to the United States Constitution states:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. U.S. CONST. amend. V.

The Sixth Amendment to the United States Constitution states:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence. U.S. CONST. amend. VI.

Section 1 of the Fourteenth Amendment to the United States Constitution states:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES AND RULES INVOLVED IN THIS CASE

STATUTES

22 OKLA. STAT. § 1051.

(a) An appeal to the Court of Criminal Appeals may be taken by the defendant, as a matter of right from any judgment against him, which shall be taken as herein provided; and, upon the appeal, any decision of the court or intermediate order made in the progress of the case may be reviewed; provided further, all appeals taken by petition for writ of certiorari to the Court of Criminal Appeals, as provided in paragraph (b) of this section, provided such petition must be filed within ninety (90) days from the date of said conviction. The Court of Criminal Appeals may take jurisdiction of any case for the purpose of correcting the appeal records when the same do not disclose judgment and sentence; such jurisdiction shall be for the sole purpose of correcting such defect or defects.

(b) The procedure for the filing of an appeal in the Court of Criminal Appeals shall be as provided in the Rules of the Court of Criminal Appeals; and the Court of Criminal Appeals shall provide by court rules; which will have the force of statute, and be in furtherance of this method of appeal: (1) The procedure to be followed by the trial courts in the preparation and authentication of transcripts and records in cases appealed under this act; (2) the procedure to be followed for the completion and submission of the appeal taken hereunder; and (3) the procedure to be followed for filing a petition for and the issuance of a writ of certiorari.

(c) The scope of review to be afforded on certiorari shall be prescribed by the Court of Criminal Appeals.

COURT RULES

Rule 4.2, Rules of the Oklahoma Court of Criminal Appeals, 22 OKLA

STAT., ch. 18., app. (1998):

Rule 4.2. Requirements for Commencement of Certiorari Appeal

A. Application to Withdraw Plea. In all cases, to appeal from any conviction on a plea of guilty or nolo contendere, the defendant must have filed in the trial court clerk's office an application to withdraw the plea within ten (10) days from the date of the pronouncement of the Judgment and Sentence, setting forth in detail the grounds for the withdrawal of the plea and requesting an evidentiary hearing in the trial court. *See* Sections 1051 and 1054 of Title 22.

B. Evidentiary hearing. The trial court shall hold an evidentiary hearing and rule on the application within thirty (30) days from the date it was filed. No matter may be raised in the petition for writ of certiorari unless the same has been raised in the application to withdraw the plea, which must accompany the records filed with this Court. PROVIDED HOWEVER, if the trial court fails to hold the evidentiary hearing within thirty (30) days, petitioner may seek extraordinary relief with this Court.

C. Motion for a New Trial. No motion for a new trial is required.

D. Notice of Intent to Appeal and Designation of Record. A defendant seeking to appeal a denial of the application to withdraw the plea shall file notice of intent to appeal, together with the designation of record, in the trial court within ten (10) days from the date the application to withdraw the plea of guilty or nolo contendere is denied. It shall be the responsibility of trial counsel to file all jurisdictional documents required to seek a petition for writ of certiorari before this Court, including the notice of intent to appeal form required by Rule 1.14(C) and Rule 13.4; however, Form 13.4 can be amended to comply with the requirements for certiorari. The filing of the Notice of Intent to Appeal and Designation of Record in the district court is jurisdictional and failure to timely file constitutes waiver of the right to appeal. A certified copy of the Notice of Intent to Appeal and

Designation of Record shall also be filed by trial counsel with the Clerk of this Court within ten (10) days from the date the Notice is filed in the trial court. *See* Section II, Rule 2.5(B), for procedures on counter designation of record.

Amended effective Nov. 1, 1995.

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STATEMENT OF THE CASE

Reginald Ronald Johnson entered a plea of guilty to eight felony counts in the District Court of Oklahoma County, State of Oklahoma, on February 9, 1998. Mr. Johnson was sentenced on March 27, 1998, to a cumulative sentence of 160 years on the eight felony counts. Mr. Johnson timely filed his motion to withdraw plea of guilty, pursuant to Rule 4.2, *Rules of the Oklahoma Court of Criminal Appeals*, 22 OKLA. STAT., ch. 18, app. (1998), and the district court held an evidentiary hearing on the motion to withdraw plea of guilty on April 29, 1998. The District Court of Oklahoma County, the Hon. Richard W. Freeman, District Judge, issued an order denying Mr. Johnson's application to withdraw his plea of guilty.

Mr. Johnson perfected his direct appeal pursuant to 22 OKLA. STAT. §1051 to the Oklahoma Court of Criminal Appeals from the denial of his motion to withdraw his plea of guilty. Mr. Johnson raised four propositions of error in his direct appeal.

He first alleged that he was deprived of effective assistance of counsel under the Sixth and Fourteenth Amendments to the Constitution. The Oklahoma Court of Criminal Appeals found that Mr. Johnson was not deprived of effective assistance of counsel, and the appellate court further found that Mr. Johnson has failed to show how any omission by counsel in explaining the difference between "withdrawing the guilty plea" and "moving to withdraw the guilty plea" was prejudicial.

Pursuant to Rule 14(g)(i) of the Rules of the Supreme Court, Mr. Johnson shows the Court that his Sixth and Fourteenth Amendment claim was raised in his written application to withdraw pleas of guilty in the court of first instance on pages two and three of that application, which was filed in the District Court of Oklahoma County, State of Oklahoma, on April 6, 1998. (O.R. 108-112). The pertinent verbatim quotation from Mr. Johnson's

application to withdraw plea of guilty is as follows:

> 4. That the Defendant was denied effective assistance of counsel under the Sixth and Fourteenth Amendments to the federal Constitution and Article II, § 21 of the Oklahoma Constitution when his attorney, Michael S. Johnson,assured Defendant that by entering a plea of guilty on February 9, 1998, that the Defendant would be sentenced to a term of twenty-five (25) years imprisonment, with the terms of imprisonment to run concurrently in the above numbered cases. **See e.g. Hill v. Lockhart**, 474U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); **McMann v. Richardson**, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970); **Lozoya v. State,** 932 P.2d 22, 31-33 (Okl.Cr.1996); **Braun v. State**, 909 P.2d 783, 789-791 (Okl.Cr.1995); **Estell v. State,** 766 P.2d 1380, 1382-1383 (Okl.Cr.1988); **Medlock v. State**, 887 P.2d 1333, 1345 (Okl.Cr.1994). More specifically, the Defendant was told by his attorney that if the judge did not sentence the Defendant to a total term of twenty-five years imprisonment, that the Defendant could withdraw his plea, and that defense counsel did not explain the difference between "withdrawing a plea of guilty" and "filing a motion to withdraw a plea of guilty."
>
> (O.R. 109-110).

Mr. Johnson further shows the Court that his Sixth and Fourteenth Amendment claim was raised in the appellate court on the similar grounds. (Brief at pp. 9-15). Pursuant to Rule 14(g)(i), Mr. Johnson shows the Court the following verbatim quote from his appellate brief before the Oklahoma Court of Criminal Appeals:

> The question is not whether, for Sixth Amendment purposes, Petitioner was sentenced within the range of punishment for the offenses charged, nor whether he was even advised by the trial court prior to taking his plea of the ranges of punishment. A criminal

> defendant will place more assurance in the oral representations of his attorney, as he *should*, than in a programmatic recital of advisements from the trial court. There is no Supreme Court case law that identifies the **Strickland/Hill** prejudice prong in a manner that identifies "prejudice" as being outside the range of statutory punishment for the offenses charged. Rather, the question for Sixth Amendment purposes is whether the 160 years he received was prejudicial after being induced by his attorney that the Petitioner would receive a sentence of twenty-five years on all counts to run concurrently. The Court can only conclude that this is actual prejudice for purposes of the Sixth Amendment, and the Supreme Court of the United States would agree. U.S. Const. amends. VI, XIV.
>
> (Brief at pp. 13-14).

In his second proposition of error, Mr. Johnson alleged that he was deprived of due process of law because the state reneged on its plea agreement which induced the plea resulting in the 160 year sentence. The appellate court found that a valid plea agreement was not reached among all the parties and accepted by the court until February 9, 1998. The Oklahoma Court of Criminal Appeals also found that the record before the appellate court indicated that discussions were held on January 12, 1998, concerning a possible plea, but the only summary of facts form contained in the record is dated February 9, 1998, and that form indicates that the pleas were blind pleas. The Oklahoma Court of Criminal Appeals held that Mr. Johnson failed to show that the State "reneged" on any plea agreement and that he was deprived of his rights to due process by the trial court's acceptance of the guilty pleas of February 9, 1998, and subsequent imposition of sentence.

In his third proposition of error, Mr. Johnson alleged that he was unlawfully subjected to double jeopardy in violation of his constitutional rights. Mr. Johnson raised the Fifth and Fourteenth Amendments to the Constitution in support of his claim both in the court of first instance and before the appellate court. (O.R. 110- 111; Brief at pp. 17-18). In the

motion to withdraw plea of guilty, Mr. Johnson stated as follows:

> 6. That the Defendant was subjected to double jeopardy at his sentencing on March 27, 1998, in violation of his constitutional rights under the Fifth and Fourteenth Amendments to the United States Constitution and Article II, 21 of the Oklahoma Constitution. **LeMay v. Rahhal,** 917 P.2d 18, 22-23 (Okl.Cr.1996); **Powell v. District Court of the Seventh Judicial Dist.,** 473 P.2d 254, 256 (Okl.Cr.1970).
>
> (O.R. 110-111).

Appellant raised the Fifth and Fourteenth Amendment issue of double jeopardy before the appellate court as well. A verbatim quotation of the same is as follows:

> However, being advised of one's right to a jury trial is not the test for determining whether there is a violation of one's right against double jeopardy under the Fifth and Fourteenth Amendments to the United States Constitution and Article II, 21 of the Oklahoma Constitution. The test is whether a plea of guilty was made, and although there is no transcript record of the same made on that date, "there is no doubt whatsoever but that [Petitioner] was in jeopardy from the moment he entered his plea of guilty [on January 12, 1998]." **LeMay v. Rahhal**, 917 P.2d at 23, *quoting* **Powell**, 473 P.2d at 256.
>
> The overwhelming evidence shows that Petitioner did in fact enter a guilty plea to the eight counts on January 12, 1998. (Tr. 4/29/98 at 7, 8, 9, 12-13, 25, 26, 27, 29). *Even the Assistant District Attorney* acknowledged that Petitioner was sentenced on January 12, 1998. (Tr. 4/29/98 at 17). *She termed it a "faulty plea."* (Tr. 4/29/98 at 41). *Even the trial court acknowledged in direct contravention of* **LeMay v. Rahhal** *that "in essence" it ordered Petitioner's plea withdrawn on January 15, 1998.* (Tr. 4/29/98 at

> 38). Petitioner was denied his constitutional rights under the Fifth and Fourteenth Amendments by being forced to enter another plea and for being punished more harshly the second time after entering his second plea of guilty on February 9, 1998, and he was also denied his constitutional rights under Article II, § 21 of the Oklahoma Constitution. U.S. Const. amends V, XIV; Okl. Const. art. II, § 21.

The Oklahoma Court of Criminal Appeals held that Mr. Johnson was not only not unlawfully subjected to double jeopardy, but waived any such claim by the entering of the February 9, 1998, guilty pleas.

In his fourth proposition of error raised on direct appeal, Mr. Johnson alleged that his plea of guilty was unknowing and involuntary. Mr. Johnson raised this in the court of first instance, and specifically alleged as follows:

> 7. That the plea the Defendant entered was involuntary and unknowing, made inadvertently and induced by legerdemain on the part of his former defense counsel, Michael S. Johnson, and/ or the counsel for the State of Oklahoma, and that therefore the Defendant is entitled to withdraw his plea of guilty under the Due Process Clauses of the state and federal constitutions. **Boykin v. Alabama,** 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); **Carpenter v. State,** 929 P.2d 988, 997-998 (Okl.Cr.1996); **King v. State,** 553 P.2d 529 (Okl.Cr.1976).
>
> (O.R. 111).

Mr. Johnson raised his *Boykin* claim before the Oklahoma Court of Criminal Appeals. (Brief at pp. 18-19). The Oklahoma Court of Criminal Appeals held that the record reflected that the pleas entered on February 9, 1998, were knowing and voluntary.

Mr. Johnson timely filed his petition for rehearing. In the petition

for rehearing, Mr. Johnson raised four allegations. Mr. Johnson first alleged that in concluding that Mr. Johnson "failed to show how any omission by counsel in explaining the difference between 'withdrawing the guilty plea' and 'moving to withdraw the guilty plea' was prejudicial, the appellate court overlooked the arguments and authorities duly submitted by Mr. Johnson in his appellate brief. The Oklahoma Court of Criminal Appeals found that with regard to this allegation, all issues raised in the direct appeal were fully considered by the court and no questions decisive of the case and duly submitted were overlooked.

In his second proposition for rehearing, Mr. Johnson alleged that the Court's decision was in conflict with *LeMay v. Rahhal*, 917 P.2d 18 (Okl.Cr.1996); *Allen v. City of Oklahoma City*, 965 P.2d 387 (Okl.Cr.1998); and *Lozoya v. State*, 932 P.2d 22 (Okl.Cr.1996) and the evidence in the record in determining that Mr. Johnson's double jeopardy rights were not violated. The appellate court found that *Allen* and *Lozoya* were not raised in the appellate brief, and the appellate court further found that Mr. Johnson's double jeopardy right was not violated after fully considering all three cases. The appellate court found *LeMay* to be distinguishable but it did not elaborate upon the same.

In his third proposition for rehearing, Mr. Johnson alleged that the appellate court's decision was in conflict with *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 223 L.Ed.2d 274 (1969). The appellate court found that *Boykin* was cited in the appellate brief and fully considered by the appellate court in determining that the guilty pleas were entered knowingly and voluntarily.

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REASONS FOR GRANTING THE WRIT

I. The Oklahoma Court of Criminal Appeals' opinion directly conflicts with this Court's Sixth Amendment effective assistance of counsel

precedents by refusing to find prejudice where a criminal defendant is punished much more harshly that the expected result which his attorney represented to him, where the plea of guilty was induced by the attorney's material misrepresentation of the procedure to withdraw the guilty plea.

The decision below is directly in conflict with *Tollett v. Henderson,* 411 U.S. 258, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973) and *McMann v. Richardson,* 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970). Under *Tollett,* a defendant who pleads guilty upon the advice of counsel "may attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann. Tollett,* 93 S.Ct. at 1608. The standard set forth in *McMann* is that the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases. *McMann,* 90 S.Ct. at 1449.

The findings of the Oklahoma Court of Criminal Appeals do not contradict the evidence that Mr. Johnson's attorney, Michael S. Johnson, failed to make a distinction between advising his client that he could "withdraw his plea" and "move to withdraw his plea." The evidence in the record shows conclusively that Mr. Johnson's attorney told Mr. Johnson that if he did not like the sentence he received from his plea on February 9, 1998, he could withdraw the plea. (Tr. 4/29/98 at 31; Brief at p. 9). Attorney Johnson simply represented to his client that he had ten days to withdraw his plea. (Tr.4/29/98 at 15, 32; Brief at p. 9). Attorney Johnson told his client that if he (i.e. the Petitioner) was unhappy with his sentence that he could withdraw his plea. (Tr.4/29/98 at 15; Brief at 9).

The inducement to get a client to enter a blind plea based upon the expectation that the client has an absolute right to withdraw the plea, rather than the right to merely request the same by filing a timely motion, following the sentence is a material misrepresentation of fact that is not within the standards of competence demanded of criminal defense attorneys. Such a representation without more deprives a criminal defendant of his Sixth

Amendment right to counsel and is prejudicial where the criminal defendant is given the expectation that the trial court will sentence the criminal defendant to a term of years considerably less than that expected by the client and his attorney. The Court has not addressed the outer boundaries of the "standards expected of criminal defense attorneys" at guilty plea hearings under its Sixth Amendment right to counsel cases since the Court reaffirmed the *McMann* standard *Tollett and McMann* in light of *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). Further, the Court has not stated whether the "prejudice" prong of the *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) test for evaluating ineffective assistance of counsel claims is totally independent of the "objective unreasonable performance prong" under *Strickland's* two part test, when the unreasonable performance is made in an obvious attempt to induce the guilty plea so that the attorney can avoid a trial. The Oklahoma Court of Criminal Appeals' decision is has rendered the *McMann* standard of what to expect of criminal defense attorneys in criminal cases meaningless and the decision is irreconcilable with *McMann* and its progeny. Therefore, certiorari is appropriate.

II. The Oklahoma Court of Criminal Appeals Opinion Erroneously Extends the Waiver Defense Against a Claim of Double Jeopardy on Collateral Review to a Case on Direct Review.

The Oklahoma Court of Criminal Appeals' opinion is directly in conflict with *Menna v. New York*, 423 U.S. 61, 96 S.Ct. 241, 46 L.Ed.2d 195 (1975). In *Menna*, the Court held that where the State s precluded by the United States Constitution from haling a defendant into court on a charge, federal law requires that a conviction on that charge be set aside even if the conviction was entered pursuant to a counseled plea of guilty. *Menna*, 423 U.S. at 62; 96 S.Ct. at 242. In the present case, Mr. Johnson presented the Oklahoma Court of Criminal Appeals with clear and convincing evidence that Mr. Johnson did in fact enter a guilty plea to all eight counts on January 12, 1998. (Tr.4/29/98 at pp. 7, 8, 9, 12-13, 25, 26, 27, 29; Brief at 17-18). Mr. Johnson further presented the Oklahoma Court of Criminal Appeals

with unrefuted evidence from his own testimony and the testimony of his former attorney, Michael S. Johnson, that on January 12, 1998, Mr. Johnson, the petitioner herein, was also sentenced to a term of twenty-five years imprisonment on each of the counts with the terms of each count to run concurrently. (Tr.4/29/98 at pp. 7-9; 17, 27, 29, 36, 44; Brief at p. 7). Even the assistant district attorney who prosecuted Mr. Johnson acknowledged on the record that Mr. Johnson was sentenced to twenty-five years imprisonment on January 12, 1998. (Tr. 4/29/98 at p. 17; Brief at p. 7). The trial judge stated, inexplicably, that he did not remember whether he sentenced Mr. Johnson that day. (Tr.4/29/98 at p. 44).

The Oklahoma Court of Criminal Appeals holding that even if Mr. Johnson had a double jeopardy claim, such a claim was waived by his counseled plea of guilty on February 9, 1998, was error under *Menna.* Furthermore, the Oklahoma Court of Criminal Appeals has conflated the waiver defense against double jeopardy under this Court's collateral review jurisprudence in *Mabry v. Johnson*, 467 U.S. 504, 508, 104 S.Ct. 2543, 81 L.Ed.2d 437 (1984) with cases on direct appeal, such as the instant case. Such a conflation denudes the protections of the Double Jeopardy Clause against those who enter a plea of guilty to a charge, are sentenced to the same, and then enter a subsequent plea of guilty and a second sentence, despite being represented by counsel at the second plea of guilty. The conflict between the Oklahoma Court of Criminal Appeals' decision, *Menna and Mabry* are irreconcilable. Therefore, certiorari is appropriate.

III. The Oklahoma Court of Criminal Appeals' Opinion Erroneously Found that Mr. Johnson's right to due process of law was not violated when he plea was taken without a court reporter despite his refusal to waive a court reporter.

In *Boykin v. Alabama,* 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), the Court stated that presuming waiver from a silent record is impermissible in determining whether a guilty plea is voluntarily made. 395 U.S. 238, 243; 89 S.Ct. 1709, 1712. Inducements might be a perfect

cover-up of unconstitutionality. Id. The question of an effective waiver of a federal constitutional right in a proceeding is of course governed by federal standards. *Id.*

In the instant case, the Oklahoma Court of Criminal Appeals found that Mr. Johnson's plea of guilty on February 9, 1998, was made knowingly and voluntarily. The court reporter for the trial judge gave an affidavit stating that she had searched her records and had no stenographic records of taking down notes of a plea of guilty entered by Mr. Johnson on February 9, 1998. (O.R. 139-140). Mr. Johnson explicitly refused to waive his right to a court reporter. (O.R. 90). The Oklahoma Court of Criminal Appeals found no error under the Due Process Clause and *Boykin.*

The Court should grant certiorari to determine if the Due Process Clause of the Fourteenth Amendment contains the concomitant right to a transcription of the proceedings at a guilty plea hearing in a felony case when requested. The Oklahoma Court of Criminal Appeals' decision is in conflict with *Boykin,* and therefore, certiorari is appropriate.

- - - - - - - ♦ - - - - - - -

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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- - - - - - - ♦ - - - - - - -

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document, together with the accompanying appendix, was mailed by first class mail with postage prepaid to the following persons on the 1st day of June, 1999:

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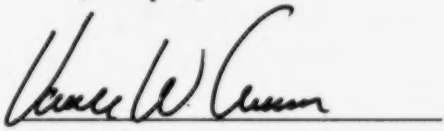

Vance W. Armor

APPENDIX

The following is a verbatim restatement of the Oklahoma Court of Criminal Appeals December 29, 1998 Summary Opinion Denying Certiorari in *Reginald Ronald Johnson v. State of Oklahoma,* Case No. C-98-533. A verbatim restatement of the March 3, 1999, order denying rehearing and directing issuance of mandate follows the summary opinion denying certiorari within this appendix.

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

REGINALD RONALD JOHNSON	)	
	)	
Petitioner,	)	**NOT FOR PUBLICATION**
	)	
v.	)	Case No. C-98-533
	)	
STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

LUMPKIN, J.

SUMMARY OPINION DENYING CERTIORARI

Petitioner Reginald Ronald Johnson was charged with Concealing Stolen Property (Count I)(59 O.S.1991, § 1512) and False Declaration of Ownership to a Pawnbroker (Count II) (21 O.S.1991, § 1713) both counts After Former Conviction of a Felony, in Case No. CF-97-1644. Petitioner was also charged in Case Nos. CF-97-2333 and CF-97-3136 with the same two offenses. In Case No. CF-97-4265, Petitioner was charged with Possession of a Controlled Dangerous Substance with Intent to Distribute, (63 O.S.1991, § 2-401) After Former Conviction of a Felony. In Case No. CF-97-5209,

Petitioner was charged with Second Degree Burglary (21 O.S.1991, § 1431), After Former Conviction of a Felony. On February 9, 1998, Petitioner entered guilty pleas to all of the above counts before the Honorable Richard W. Freeman, District Judge, District Court of Oklahoma County. The trial court accepted the pleas and on March 27, 1998, sentenced Petitioner to twenty (20) years in each count, said sentences to run consecutively. On April 6, 1998, Petitioner filed a Motion to Withdraw Pleas of Guilty. After an April 29, 1998, hearing, the motion was denied. It is that denial which is the subject of this appeal. Petitioner raises the following propositions of error in support of his appeal.

I. Petitioner was deprived of effective assistance of counsel.

II. Petitioner was deprived of due process of law because the State reneged on its plea agreement which induced the plea resulting in the 160 year sentence.

III. Petitioner has been unlawfully subjected to double jeopardy in violation of his constitutional rights.

IV. Petitioner's plea on February 9, 1998, was unknowing and involuntary.

After a thorough consideration of these propositions and the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we have determined that neither reversal nor modification is required under the law and evidence. In reaching our decision, we find in Proposition I that Petitioner was not deprived of the effective assistance of counsel. He has failed to show how any omission by counsel in explaining the difference between "withdrawing the guilty plea" and "moving to withdraw the guilty plea" was prejudicial. *Strickland v. Washington*, 466 U.S. 686, 696, 104 S.Ct. 2052, 2070, 80 L.Ed.2d 674, 699 (1984). In Propositions II and III, we find a valid plea agreement was not reached among all the parties and accepted by the Court until February 9, 1998. The record before this

Court indicates that discussions were held on January 12, 1998, concerning a possible plea. However, the only Summary of Facts form contained in the record is dated February 9, 1998. Further, this form, signed by all parties, indicates the pleas entered were blind pleas. Accordingly, Petitioner has failed to show the State reneged" on any plea agreement and that he was deprived of his rights to due process by the trial court's acceptance of the guilty pleas of February 9, 1998, and subsequent imposition of sentence. Further, Petitioner was not only not unlawfully subjected to double jeopardy, but waived any such claim by the entering of his guilty pleas. See *Mabry v. Johnson*, 467 U.S. 504, 508, 104 S.Ct. 2543, 81 L.Ed.2d 437 (1984)(a voluntary and intelligent plea of guilty made by an accused, who has been advised by competent counsel, may not be collaterally attacked on appeal); *Frederick v. State*, 811 P.2d 601, 603 (Okl.Cr.1991)(a voluntary guilty plea waives all nonjurisdictional defenses). In Proposition IV, the record reflects the pleas entered on February 9, 1998, were knowing and voluntary. *See Ocampo v. State*, 778 P.2d 920 (Okl.Cr.1989). Accordingly, the order of the district court denying Petitioner's motion to withdraw pleas of guilty is **AFFIRMED** and **CERTIORARI IS DENIED**.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE RICHARD FREEMAN, DISTRICT JUDGE

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NO RESPONSE NECESSARY

OPINION BY: LUMPKIN, J.
CHAPEL, P.J.: CONCUR
STRUBHAR, V.P.J.: CONCUR
LANE, J.: CONCUR
JOHNSON, J.: CONCUR

OA

The following is a verbatim statement of the March 3, 1999, Order Denying Rehearing and Directing Issuance of Mandate issued by the Oklahoma Court of Criminal Appeals in *Reginald Ronald Johnson v. State of Oklahoma*, Case No. C-98-533.

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

REGINALD RONALD JOHNSON,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. C-98-533
	)	
STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

ORDER DENYING REHEARING AND DIRECTING ISSUANCE OF MANDATE

Petitioner entered guilty pleas to Concealing Stolen Property (Count I)(59 O.S.1991, § 1512) and False Declaration of Ownership to a Pawnbroker (Count II)(21 O.S.1991, 1713), both counts After Former Conviction of a Felony, in Case No. CF-97-1644. Petitioner also entered guilty pleas to the same two offenses in Case Nos. CF-97-2333 and CF-97-3136 as well as to charges of Possession of a Controlled Dangerous Substance with Intent to Distribute, (63 O.S.1991, § 2-401), After Former Conviction of a Felony, Case No. CF-97-4265, and Second Degree Burglary (21 O.S.1991, § 1431), After Former Conviction of a Felony, Case No. CF-97-5209. The Honorable Richard W. Freeman, District Judge, District Court of Oklahoma County, accepted the guilty pleas and sentenced Petitioner to twenty (20) years in each count, said sentences to run consecutively. Petitioner's Motion to Withdraw Pleas of Guilty was overruled by the trial

court and this Court affirmed that ruling in *Johnson v. State*, C-98-533 (opinion not for publication December29, 1998).

Petitioner is now before the Court on a Petition for Rehearing Rule 3.14, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (1998). According to Rule 3.14, a Petition for Rehearing shall be filed for two reasons only:

(1) That some question decisive of the case and duly submitted by the attorney of record has been overlooked by the Court or

(2) That the decision is in conflict with an express statute or controlling decision to which the attention of this Court was not called either in the brief or in oral argument.

As grounds for his petition, Petitioner raises four allegations: 1) in concluding "that Petitioner failed to show how any omission by counsel in explaining the difference between 'withdrawing the guilty plea' and 'moving to withdraw the guilty plea' was prejudicial", this Court has overlooked the arguments and authorities duly submitted by Petitioner in his appellate brief; 2) this Court's decision is in conflict with *LeMay v. Rahhal*, 917 P.2d 18 (Okl.Cr.1996), *Allen v. City of Oklahoma City*, 965 P.2d 387 (Okl.Cr.1998), and *Lozoya v. State*, 932 P.2d 22 (Okl.Cr.1996) and the evidence in the record in determining that Petitioner's double jeopardy rights were not violated; 3) this Court's decision is in conflict with *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 223 L.Ed.2d 274 (1969) and 20 O.S.1991, § 106.4; and 4) this Court's decision is in conflict with 21 O.S.1991, § 51 because the sentences for six of the eight counts are excessive and beyond the statutory range of punishment.

We have reviewed Petitioner's allegations and find that he is not entitled to a rehearing. As to Proposition I, all issues raised in the direct appeal were fully considered by the Court and no questions decisive of the case and duly submitted were overlooked. Therefore, rehearing is not warranted. As for Proposition II, two of the cases cited by Petitioner, *Allen v. City of Oklahoma City*, 965 P.2d 387 (Okl.Cr.1998) and *Lozoya v. State*, 932 P.2d 22 (Okl.Cr.1996) were not raised in the appellate brief. In finding that Petitioner's double jeopardy rights were not violated we fully considered *LeMay v. Rahhal*, 917 P.2d 18 (Okl.Cr.1996), cited in the appellate

brief, and found it distinguishable. Having now reviewed the additional cases of *Allen* and *Lozoya*, we find our decision is not conflict with either of those two cases. Therefore, rehearing is not warranted.

As for Proposition III, *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 223 L.Ed.2d 274 (1969) was cited by Petitioner in his appellate brief and fully considered by this Court in determining the guilty pleas were entered knowingly and voluntarily. Title 20 O.S.1991, § 106.4, cited in the appellate brief, was not specifically addressed by this Court in the opinion. We find our decision is not in conflict with section 106.4. The record before this Court shows Petitioner waived his statutory right to a court reporter at the February 9, 1998, plea hearing. See *Higgins v. State*, 506 P.2d 575, 578 (Okl.Cr.1973). Further, the record in this case is sufficient to allow this Court to fully review the plea proceedings and find that knowing and voluntary pleas were entered. See *O'Dell v. State*, 654 P.2d 621, 623 (Okl.Cr.1982). Finally, Proposition IV, Petititioner has raised a new allegation not previously raised on appeal. New, additional allegations are not properly raised on rehearing. Rule 3.14, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, app. (1998).

Having reviewed Petitioner's allegations, we find he is not entitled to rehearing. Therefore, based upon the foregoing, this Motion for Rehearing is **DENIED**. The Clerk of this Court is ordered to issue the mandate forthwith.

IT IS SO ORDERED.

WITNESS OUR HAND AND THE SEAL OF THIS COURT this 3rd day of March, 1999.

s\ Reta M. Strubhar

RETA M. STRUBHAR, Presiding Judge

s\ Gary L. Lumpkin

GARY L. LUMPKIN, Vice Presiding Judge

s\ Charles A. Johnson

CHARLES A. JOHNSON, Judge

s\ Charles S. Chapel

CHARLES S. CHAPEL, Judge

s\ Steve Lile

STEVE LILE, Judge

ATTEST:

s\ James Patterson